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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 CINDY M. ESTRADA,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL
13 SECURITY,

14 Defendant.

15 Case No. C18-5362-RSM

16 ORDER DENYING MOTION FOR
17 EXTENSION OF TIME TO FILE
18 APPEAL

19 I. INTRODUCTION

20 This matter comes before the Court on Plaintiff Cindy M. Estrada's Motion for Extension
21 of Time to File Appeal. Dkt. #48. The Court finds that Plaintiff has provided an insufficient
22 reason for a delay in filing her appeal and, balancing the factors under Rule 4(a)(5), Plaintiff has
23 not met her burden in showing excusable neglect and therefore denies the Motion.

24 II. BACKGROUND

25 Plaintiff initiated this action for judicial review, under 42 U.S.C. §§ 405(g) and
26 § 1383(c)(3), of the Commissioner of Social Security's (the "Commissioner") final decision
27 denying her application for Title II Disability Insurance Benefits and Title XVI Supplemental
28 Security Income benefits. Dkt. #4. The Honorable Mary Alice Theiler, United States Magistrate

1 Judge, recommended that this Court affirm the decision of the Commissioner. Dkt. #16.
 2 Considering Plaintiff's objections to Judge Theiler's Report and Recommendation ("R&R"), the
 3 Court overruled the objections and adopted the R&R, affirming the Commissioner's decision.
 4 Dkt. #19. Plaintiff appealed. Dkt. #22.

5 On March 31, 2021, the Ninth Circuit Court of Appeals issued a memorandum decision
 6 concluding that administrative review of Plaintiff's application had not enjoyed the benefit of the
 7 Ninth Circuit's decision in *Revels v. Berryhill*, 874 F.3d 648 (9th Cir. 2017). The Ninth Circuit
 8 characterized Revels as "conclud[ing] that the [administrative law judge ("ALJ")] erred in
 9 rejecting a claimant's testimony where the ALJ stated that the testimony was 'undercut by the
 10 lack of "objective findings" supporting her claims of severe pain' because examinations showing
 11 mostly normal results 'are perfectly consistent with debilitating fibromyalgia.'" Dkt. #27 at 2–3
 12 (quoting *Revels*, 874 F.3d at 666). The Ninth Circuit therefore ordered that the Commissioner's
 13 prior decision be vacated and that the matter be remanded for reconsideration by the ALJ. *Id.* at
 14 3. The Ninth Circuit's mandate was issued on May 25, 2021. Dkt. #28.

15 Accordingly, this Court ordered that pursuant to sentence six of 42 U.S.C. § 405(g), the
 16 matter was remanded for further administrative proceedings in a manner consistent with the
 17 Ninth Circuit Court of Appeals' memorandum decision. Dkt. #29. The Court also issued an
 18 Amended Judgment stating:

19 THE COURT HAS ORDERED THAT pursuant to sentence six of 42 U.S.C. § 405(g),
 20 this matter is REMANDED for further administrative proceedings in a manner consistent
 21 with the Ninth Circuit Court of Appeals' memorandum decision

22 Dkt. #30. The Amended Judgment did not make a finding as to whether the Commissioner's
 23 judgment was affirmed, modified, or reversed in light of the Ninth Circuit's memorandum
 24 decisions. *See id.* While the Court did not issue a final judgment, the issuing of a "judgment"
 25 alone caused confusion.

1 Plaintiff subsequently filed a Motion for Attorney's Fees, Cost, and Expenses Pursuant
 2 to the EAJA (Dkt. #32) and a Motion to Correct Scrivener's Error Pursuant to Fed. R. Civ. P. 60
 3 (Dkt. #41).

4 On January 25, 2023, the Court denied Plaintiff's Motion to Correct Scrivener's Error
 5 Pursuant to Fed. R. Civ. P. 60 (Dkt. #41), denied Plaintiff's Motion for Attorney's Fees, Cost,
 6 and Expenses Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA") (Dkt.
 7 #32) as premature, and remanded the matter for further administrative proceedings in a manner
 8 consistent with the Ninth Circuit Court of Appeals' memorandum decision. Dkt. #46.

9
 10 Per Federal Rule of Civil Procedure 4(a)(1)(B), Plaintiff had 60 days to appeal this
 11 Court's January 25, 2023, order. The deadline was Monday, March 27, 2023. *See* Fed. R. Civ.
 12 P. 6(a)(1)(C) (extending deadline if the deadline falls on Sunday). Plaintiff filed the notice of
 13 appeal on Tuesday, March 28, 2023. Dkt. #47. Plaintiff also filed the instant motion for an
 14 extension of time to allow for late filing of the notice of appeal. ECF #48-49. Plaintiffs' counsel
 15 stated he missed the deadline because he "had two briefs due yesterday, including a Ninth Circuit
 16 Reply Brief, and I failed to check my deadlines spreadsheet yesterday at the end of a very long
 17 day." Dkt. #49 at 1. Defendant Commissioner of Social Security (hereinafter, the
 18 "Commissioner") opposes the motion for extension stating plaintiff counsel's "threadbare excuse
 19 does not establish excusable neglect under Fed. R. App. P. 4(a)(5)." Dkt. #51 at 2.
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22 III. ANALYSIS

23 Under Federal Rule of Appellate Procedure 4(a)(5)(A),
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25 The district court may extend the time to file a notice of appeal if:

- 26 (i) a party so moves no later than 30 days after the time prescribed by this Rule
 27 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after
 28 the time prescribed by this Rule 4(a) expires, that party shows excusable neglect
 or good cause.

1 Fed. R. App. P. 4(a)(5)(A). The good cause and excusable neglect standards are separate and
 2 apart. Fed. R. App. P. 4 at 2002 Amendments at Subd. (a)(5)(A)(ii). As the note to the 2002
 3 Amendments to the Federal Rules of Appellate Procedure explains:

4 They are not interchangeable, and one is not inclusive of the other. The excusable
 5 neglect standard applies in situations in which there is fault; in such situations, the need
 6 for an extension is usually occasioned by something within the control of the movant.
 7 The good cause standard applies in situations in which there is no fault—excusable or
 otherwise. In such situations, the need for an extension is usually occasioned by
 something that is not within the control of the movant.

8 *Id.*

9 Plaintiff filed her Motion after the 60-day appellate deadline already passed and
 10 therefore the good cause standard does not apply here.

12 As to whether there is excusable neglect, the Ninth Circuit applies four factors in
 13 determining under Rule 4(a)(5): “(1) the danger of prejudice to the non-moving party, (2) the
 14 length of delay and its potential impact on judicial proceedings, (3) the reason for the delay,
 15 including whether it was within the reasonable control of the movant, and (4) whether the
 16 moving party’s conduct was in good faith.” *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir.
 17 2004) (*en banc*) (citing *Pioneer Investment Services Co. v. Brunswick Associates Ltd.
 18 Partnership*, 507 U.S. 380, 855 (1993)). “Pioneer itself instructs courts to determine the issue
 19 of excusable neglect within the context of the particular case, a context with which the trial
 20 court is most familiar.” *Id.* at 859.

23 Plaintiff’s one-page Motion was submitted along with a two-page declaration. *See* Dkt.
 24 #48–49. The Declaration of attorney Eitan Kassel Yanich states merely that he “filed the
 25 Notice of Appeal in this case one day late due to an oversight. I had two briefs due yesterday,
 26 including a Ninth Circuit Reply Brief, and I failed to check my deadlines spreadsheet yesterday
 27 at the end of a very long day.” Dkt. #59 at 1. The Court does not find that this explanation tips

1 the third factor in Plaintiff's favor. Plaintiff's reply brief provides no further convincing
2 explanation as to counsel's reason for delay. *See* Dkt. #53. Plaintiff argues that the "root cause
3 of any delay here has been the Commissioner's unexplained and unexplainable reversal of
4 position on [whether the Court's actions in issuing a sentence six remand order and a sentence
5 six judgment were mistakes]." *Id.* At 3. However, what Plaintiff claims is a "reversal of
6 position," was the entirety of the Commissioner's Response to Plaintiff's Motion to Correct
7 Scrivener's Error Pursuant to Fed. R. Civ. P. 60 (Dkt. #45)—i.e., the response brief underlying
8 the Court's order Plaintiff has appealed. In other words, Plaintiff has been aware of the
9 Commissioner's position since before the Court issued its January 25, 2023, order and therefore
10 well before the 60-day deadline for Plaintiff to appeal said order expired.
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12 As to the first factor, the Commissioner argues that the agency will be prejudiced in this
13 matter as it has already taken actions in reliance on this Court's remand order. *See* Dkt. #51 at
14 3–4. As to the second and fourth factors, the Commissioner does not argue that Plaintiff's
15 delay was made in bad faith and concedes the actual delay was minimal. However, the
16 Commissioner points to a pattern of delay, careless, and prejudice on the part of Plaintiff
17 including (1) failing to file a motion under Rule 59(e), waiting months to file the motion to
18 amend the judgment and only after the Commissioner noted that Estrada's petition for fees was
19 premature, and ultimately plaintiff counsel's threadbare excuse for missing the 60-day
20 deadline.
21

22 The Court finds that in weighing the four factors, Plaintiff has not her burden of
23 showing excusable neglect and therefore Plaintiff's Motion is DENIED.
24

25 **IV. CONCLUSION**
26

Having reviewed the relevant pleadings and the remainder of the record, the Court hereby
finds and ORDERS that Plaintiff's Motion for Extension of Time to Allow Late Filing of Appeal
(Dkt. #48) is DENIED.

DATED this 18th day of April, 2023.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE